83 - 1566

No.

In the Supreme Court of the United States

October Term, 1983

DARNELL HUNTER,
Petitioner,

vs.

REARDON SMITH LINES, LTD.,
a foreign corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE LOWER COURT PROPERLY CONCLUDED THAT ALTHOUGH THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING A SHIPOWNER'S RESPONSIBILITY CONCERNING UNKNOWN DANGERS AFTER A STEVEDORE'S ACTIVITIES HAVE BEGUN, THE TRIAL COURT ERRED IN FURTHER INSTRUCTING THAT THE SHIPOWNER WOULD BE LIABLE FOR ANY NEGLIGENCE IN FAILING PROPERLY TO REPAIR THE SHIP'S CRANE, OR TO PROPERLY SUPERVISE CARGO OPERATIONS AFTER ATTEMPTING TO DO SO, WITHOUT QUALIFYING THAT LANGUAGE BY INSTRUCTING THAT DESPITE THESE OBLIGATIONS THE STEVEDORE NONETHELESS RETAINED "PRIMARY" RESPONSIBILITY FOR THE LONGSHOREMEN'S SAFETY DURING THE COURSE OF LOADING OPERATIONS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Darnell Hunter, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on November 14, 1983, and rendered by denial of rehearing on December 22, 1983.

OPINION BELOW

The decision of the Court of Appeals is reported at 719 F.2d 1108, and appears in the appendix hereto at page A1. The judgment of the District Court appears at A16, its Order denying post-trial motions at A15; neither are reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1984; a notification to that effect appears at A17. A timely petition for rehearing was denied on December 22, 1983; the order to that effect is at A20. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

1. The Facts.

With only a few exceptions, the facts of the case are fairly presented in the Circuit Court's opinion; where appropriate we will reference additional or contradictory evidence in the Record on Appeal.[1] As the opinion notes (A3), the Petitioner (hereinafter "Hunter") was employed as a longshoreman on the Respondent's ship, assigned to the hold in order to unload bags from pallets lowered by a crane. The opinion notes that the crane in question began work at around 8:00 a.m., but was shut down within a few minutes, not only because it was "pouring oil," but also because it was "dragging," "smoking bad," making a "whining noise" and "barely coming over to the top [of the hold], and then a lot of time it

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1. "R." refers to the Record on Appeal. "Tr." refers to the consecutively-paginated seven volumes of trial testimony and argument which are designated volumes 5-11 of R. 55. Three depositions were read at trial but not transcribed (*see* Tr. 259, 266, 277, 279, 334-36). They are contained in the deposition folder of the Record on Appeal, and will be designated by the name of the individual deposed—for example, "Baker deposition at 9."

would stop in the middle of the air and swing" (A3 & n.2).[2]

At this point the third officer was on deck; his job was to observe the loading operation, to stop the operation if necessary, and to correct any defects (Baker deposition at 54-55; Hurst deposition at 24). Indeed, an officer of the ship was required to be present during loading operations "at all times" (Hurst deposition at 33). In this case the crane was inspected and repaired by ship's engineers (Tr. 27-28, 113; Baker deposition at 25-26); as the Circuit Court noted, it was down for almost two hours (A3).

As the Circuit Court also noted, there was direct evidence that the crane was not functioning properly even after operations started again; it was still dragging, barely reaching the top of the hold, stopping in mid-air and swinging, smoking badly, smelling, leaking oil, and making noises (Tr. 29-31, 42, 48, 69, 86). At least one witness said that the crane was cutting off during this time, causing its load to swing (Tr. 69, 71-73). According to the plaintiff's evidence summarized by the Circuit Court (A4), that is precisely what happened when the crane cut off and a bag fell into the hold injuring Hunter.[3]

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2. *See* Tr. 27, 48, 51, 68, 109-10, 195-96. The opinion fails to acknowledge, however, the testimony that the crane malfunctioned from the very beginning of operations (Tr. 193, 196). Either way, as we note below, the ship was not a safe place to work at the outset of operations.

3. The ship's chief officer was on deck, personally watching the loading operation, when this happened (Baker deposition at 28-29). In light of this explicit testimony, it is difficult to appreciate the Circuit Court's notation (A8 n.10) that "Hunter made a strong effort" to show the ship's knowledge of the continuing problems with the crane. Without question, the evidence taken in the light most favorable to the jury's verdict shows precisely that. The Circuit Court's opinion also says that the crane was shut down later that afternoon only because it started to rain (A5 n.6). That invaded the jury's province, in light of evidence that the crane cut off several times after the accident (Tr. 90), and eventually broke down again (Tr. 36, 80, 91, 99-100).

2. The Decision Below.

As the Circuit Court found (A8-9), the trial court properly instructed the jury, consistent with this Court's pronouncement in *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981), that the Respondent (hereinafter "Reardon") had a duty to provide a safe ship at the outset of the stevedore's operation. In addition (A9), the trial court correctly instructed that after a stevedore's cargo operations have begun, the shipowner has no general duty by way of supervision to discover unknown dangerous conditions, absent positive law or custom to the contrary. And finally, as the Circuit Court noted (A11), the trial judge instructed that upon proof of negligence and causation, Hunter might also prevail in his claim that because the crane was malfunctioning before the accident, Reardon was responsible for failing either properly to repair it, or properly to supervise cargo operations to insure its safe usage. It was this latter instruction which the Circuit Court found to have been erroneous in the absence of any qualifying language that it was the stevedore—and not Reardon—which had primary responsibility for the longshoremen's safety during the course of loading operations.

The Circuit Court reached this conclusion after acknowledging this Court's observation in *Scindia* that even after loading operations have begun, "there are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations." 451 U.S. at 175 (*see* A7). Acknowledging that the determination of whether or not problems with the ship's gear pose an unreasonable risk of harm to the longshoremen is "a matter of judgment committed to the stevedore in the first instance," *id.*, *Scindia* concludes that the shipowner may nonetheless have an obligation to repair the

defect if the shipowner is both aware of that defect and aware that the stevedore's continued use of the gear is "obviously improvident." *Id.* at 175-76.

In light of this language, the Circuit Court concluded that the trial court's instructions failed to provide the jury a sufficient basis for distinguishing the relative responsibilities of the shipowner and the stevedore regarding known dangers which threaten harm to the longshoremen during the course of loading operations (A9). The Circuit Court's holding is that even though the crane was down from the beginning of the stevedore's operation, and even though Reardon had attempted unsuccessfully to repair it, and even though Reardon was actively watching the loading operation, the trial court nevertheless should have instructed that primary responsibility for the longshoremen's safety rested with the stevedore (A11). It thus found erroneous (as incomplete) the trial court's charge that Reardon might be found liable for any negligence in failing either to repair the crane or to supervise the operations after attempting to repair the crane (A11-12). Thus, the central holding of the case is that even if the uncontradicted evidence shows that the shipowner has failed to provide a safe place to work from the outset; and even if the uncontradicted evidence shows not only that the shipowner was in fact supervising the loading operations, but also attempted unsuccessfully to repair a defect, it is reversible error to fail to instruct the jury that primary responsibility for the longshoremen's safety always rests with the stevedore during the course of loading operations.

REASONS FOR GRANTING THE WRIT

The Petitioner respectfully submits that the Circuit Court's holding seriously misconstrues this Court's decision in *Scindia*, and imposes an unwarranted and indefensible burden upon the plaintiff in an admiralty case. We find nothing in the language or objectives of the *Scindia* decision which suggests that when the uncontradicted evidence shows that a shipowner does have knowledge of a dangerous condition which either renders the ship unsafe from the outset or arises in the course of a stevedore's operation, and when the shipowner in fact attempts to repair the condition, the stevedore nonetheless has the "primary" responsibility for its correction.

To the contrary, *Scindia* strongly implies that absent some positive obligation imposed on the shipowner, the stevedore has primary responsibility *only* when a danger is undiscovered by the owner. The decision says expressly that as a "general matter," the shipowner is allowed to rely on the stevedore. 451 U.S. at 170. Thus, as the Circuit Court's opinion notes (A7), the shipowner's duties during cargo operations are "usually" limited to the requirements of contract, law or custom; and in their absence, the shipowner has no duty to discover unknown dangers. At least when any danger is unknown to the owner, therefore, we agree that *Scindia* clearly imposes the primary duty on the stevedore. As this Court wrote in *Scindia*, under such circumstances the shipowner "within limits *is* entitled to rely on the stevedore . . ." (emphasis in original). 451 U.S. at 172.

But *Scindia* clearly implies as well that the shipowner is not entitled to rely on the stevedore when the shipowner is aware of the danger, even if the stevedore also is aware of it. If we can establish that point, it positively fore-

closes any assignment of "primary" responsibility to the stevedore under such circumstances. The sole basis for the Circuit Court's conclusion to the contrary (A10) is this Court's observation in *Scindia* that the safety of the job is "a matter of judgment committed to the stevedore in the first instance." 451 U.S. at 175. But the fact that the stevedore has some initial decisionmaking responsibility hardly demonstrates that such responsibility remains "primary" under all circumstances—even circumstances in which the shipowner has failed to provide a safe ship at the outset, has knowledge that a danger exists during the course of operations, and has in fact attempted unsuccessfully to correct that danger.

1. The Duty to Provide a Safe Ship.

Consider first the obligation to provide a safe place to work at the outset. As we have noted, the evidence in this case showed either that the crane was down from the very beginning of loading operations, or was down "[w]ithin a few minutes" of their commencement (A3). Either way, according to the uncontradicted evidence, Reardon clearly failed in its burden to provide a safe place to work at the outset. As the court said in *Pluyer v. Mitsui O. S. K. Lines, Ltd.*, 664 F.2d 1243, 1246 (5th Cir. 1982), the shipowner's initial duty extends to "hazards that antedate or are coincident with the commencement of the cargo operations." Thus, the evidence was uncontradicted that Reardon had failed to provide a safe place to work at the outset. That point was simply not at issue.[4]

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4. As we have noted, Reardon was monitoring the cargo operation from the very beginning, and it was conceded that Reardon knew of the problem from the very beginning. As in another case, "[h]ere there is no question that the owner knew

(Continued on following page)

Under such circumstances, we respectfully submit that the burden of the *Scindia* holding is that "primary" responsibility does not shift to the stevedore even after loading operations have begun. To the contrary, when a shipowner has failed to provide a safe place to work at the outset, it necessarily retains primary responsibility to supervise the loading operation to insure the safety of the workplace. Thus in *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 115 (5th Cir. 1981), the court reversed a judgment n.o.v. for the shipowner in an action which alleged negligence in the failure of the shipowner to recognize that rolls of burlap which the longshoreman was unloading had been stacked in an unsafe manner: "The shipowner is therefore responsible for *eliminating* dangerous conditions which exist at the outset of the stevedoring operations . . ." (our emphasis). Thus, the obligation to provide a safe place at the outset implies a continuing responsibility to *eliminate* any dangerous conditions which pre-dated the beginning of the stevedore's activity.

Similarly, the court held in the *Pluyer* case, *supra*, 664 F.2d at 1246:

> [I]n *Scindia* the negligence was passive; the complaint was based on the vessel's failure to act. In the in-

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Footnote continued—

of the unsafe conditions . . . ." *Lieggi v. Maritime Co. of the Philippines*, 667 F.2d 324, 328 (2nd Cir. 1981). In any event, regarding the duty to provide a safe place to work at the outset, it is irrelevant whether the shipowner had actual knowledge of the defect or not: "If the defect existed from the outset, . . . the shipowner must be deemed to have had constructive knowledge." *Wild v. Lykes Brothers Steamship Corp.*, 665 F.2d 519, 521 (5th Cir. 1981). Also regarding the duty to provide a safe place to work at the outset, the stevedore's knowledge or ignorance of the danger is irrelevant. *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 657 F.2d 25, 27 (3rd Cir. 1981), *cert. denied*, 456 U.S. 914 (1982); *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 116 (5th Cir. 1981).

> stant case the negligence is active; the vessel furnished an unsafe ladder. The policy considerations which militate against imposing a duty on the shipowner to constantly monitor the stevedore's work are therefore not applicable.

By its plain language, this passage suggests that where the asserted negligence consists of a failure to provide a safe vessel at the outset, the shipowner does have a duty "to constantly monitor the stevedore's work . . . ." The same suggestion is found in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 657 F.2d 25, 27 (3rd Cir. 1981), *cert. denied*, 456 U.S. 914 (1982), in which a verdict for the plaintiff was sustained upon the theory that the shipowner had been negligent at the outset in delivering a barge with a defective hatch cover:

> The holding of *Scindia* is that "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." . . . Here, by contrast the district court found that prior to turning control of the barge over to the stevedore, [the vessel] knew or should have known of the defect, and had reason to believe that [the stevedore] might use a negligent method to remove hatch covers, but took no steps to prevent harm to the injured longshoreman. Thus *Scindia* is clearly distinguishable from this case.

The clear implication of these decisions is that where the shipowner provides an unsafe vessel from the outset, it *does* have a duty either to correct the danger or to supervise activities. That duty is inconsistent with any notion that the stevedore nonetheless retains "primary" responsibility. Our first point, then, is that when the *undisputed*

evidence shows the shipowner to have failed to provide a safe place to work at the outset, the stevedore does not bear primary responsibility for the safety of the workplace, and thus the Circuit Court's requirement of an instruction to that effect was erroneous.

2. The Duty to Correct a Danger of Which the Shipowner Has Actual Knowledge.

Second, and regardless of whether or not the workplace was safe at the outset, we submit that the Circuit Court's assignment of "primary" responsibility is inappropriate when the shipowner has actual knowledge of the danger. Here of course, the uncontradicted evidence is that Reardon had knowledge not only because it had attempted to repair the crane at the outset, but also because it had supervisory personnel monitoring the loading operation at all times.

Under such circumstances, the concept of "primary" or "secondary" responsibility has no meaning, and provides no guidance for a jury. The question instead is whether the shipowner was negligent in allowing operations to continue, and as the Circuit Court acknowledged (A11), the trial court did properly instruct in this case that Reardon would be liable for its negligence. As the court wrote in *Lieggi v. Maritime Co. of the Philippines*, 667 F.2d 324, 328 n.9 (2nd Cir. 1981), where a shipowner knows of a dangerous condition and affirmatively joins in the decision to continue working, its reliance on the stevedore to correct that condition cannot relieve it of liability: "[W]here a shipowner joins in the decision to have the men working despite the danger, it may be liable when injury results." The court continued: "In such circumstances the question whether the owner's actions were negligent or not was for the jury to decide." 667 F.2d at 328. That is what the jury

decided in this case, under proper instructions. It simply makes no sense in that context to allocate "primary" responsibility.

It is especially inappropriate when the defect in question is one which the stevedore cannot avoid except by shutting down the operation. As the court said in *Pluyer v. Mitsui O. S. K. Lines, Ltd., supra,* 664 F.2d at 1247: "[W]e have long recognized that recovery for personal injuries by longshoremen encountering open and obvious dangers is allowed where the dangers 'must be faced notwithstanding knowledge,'" *citing Gay v. Ocean Transport & Trading, Ltd.,* 546 F.2d 1233 (5th Cir. 1977). The same point was made in *Gill v. Hango Ship-Owners/AB,* 682 F.2d 1070, 1074-75 (4th Cir. 1982): "There is evidence that the manner in which the cargo was stored precluded the stevedore from unloading it by any other means except one which was inherently dangerous. If so, this is not a case in which the stevedore failed to use reasonable care but, in effect, one in which the shipowner was the *only* party at fault" (our emphasis).

That is equally the case here. Reardon had actual knowledge of the danger, and that danger concerned equipment whose use was inherent in the stevedore's activities. Since the stevedore had no choice but to use that equipment, Reardon was the *only* party at fault—assuming that Hunter satisfied its burden, about which the trial court adequately instructed, to show that Reardon was negligent in failing to fulfill its duty. But in light of the *uncontradicted* evidence that Reardon had actual knowledge of the danger and that the danger concerned equipment which the stevedore had no choice but to use, the Circuit Court made an error of law in requiring an instruction that primary responsibility for the longshoremen's safety nevertheless rested with the stevedore.

3. The Failed Attempt to Repair.

Third and finally, the evidence was uncontradicted that Reardon did in fact attempt to repair the crane when it malfunctioned. In this circumstance as well, it makes no sense to charge the jury that "primary" responsibility nonetheless rests with the stevedore. Thus the court held in *Lieggi v. Maritime Co. of the Philippines*, 667 F.2d 324, 328 (2nd Cir. 1981):

> Nor is there any question of liability predicated solely on the owner's knowledge, for here the mate affirmatively undertook to have the unsafe condition corrected. And by making this affirmative undertaking, the owner eliminated any possible reasonable basis for relying on the stevedore to correct the hazardous condition. Indeed, predictably the shipowner's undertaking to correct the condition lulled the stevedore into inaction: the hatch boss testified that although he might normally have taken steps to correct the condition, he did not do so "because the mate said he was going to come and have that wiring removed." In the circumstances of the present case, the question of shipowner negligence could not properly have been taken from the jury.

At the very least, when the shipowner, even during the course of operations, has affirmatively undertaken to repair a condition, it is inappropriate to charge that the stevedore nonetheless has "primary" responsibility for the longshoremen's safety. That conclusion was made explicit in *Lieggi*, and derives easily from this Court's pronouncement in *Scindia* that even during operations, the shipowner may be liable for hazards encountered "in areas or from equipment, under the active control of the vessel during the stevedoring operations." 451 U.S. at 167.

Again in this case, the evidence was *uncontradicted* that Reardon did attempt to repair the crane. That point was simply not at issue. The only question was whether Reardon was negligent in failing properly to repair the crane, and whether that negligence was the proximate cause of Hunter's injury. But there was no question at all that Reardon did attempt repair. In that context, it again makes no sense to charge the jury that primary responsibility nevertheless rested with the stevedore. Under the *Scindia* formulation, as articulated in *Lieggi*, that was manifestly false.

For three reasons, then, the Circuit Court erred in requiring an instruction that the stevedore has primary responsibility for the safety of the longshoremen even regarding dangers present during the course of loading operations of which the shipowner has actual knowledge. It erred first because this particular danger existed at the outset of the stevedore's operations—a fact which was undisputed—and therefore Reardon had the primary responsibility to insure a safe place to work from the outset. It erred second because, even if the dangerous condition had arisen during the course of the stevedore's operations, Reardon had actual knowledge of that condition—another fact which is undisputed—and thus acquired responsibility to correct the condition irrespective of the stevedore's improvidence in continuing operations—especially since the danger was inherent in those operations. In that context, it is inappropriate to charge that the stevedore retains "primary" responsibility. And third, it erred because it is also undisputed that Reardon did attempt to correct the condition—and in that context it is hardly appropriate to assign "primary" responsibility to the stevedore. If any of these three circumstances is shown by uncontested evidence, it is inappropriate to charge that

"primary" responsibility rests with the stevedore. Here we have all three circumstances established by uncontested evidence, and thus the Circuit Court's holding was triply inappropriate.

In saying this, we acknowledge this Court's reminder in *Scindia* that as a "general matter," the shipowner is allowed to rely on the stevedore. 451 U.S. at 170. We also agree with the Circuit Court that in the overall context of the shipowner's relationship to the stevedore, the shipowner's obligation is *"very limited"* (A10, emphasis in original). In the context of that overall relationship—concerning the vast range of known and unknown dangers on a ship—the shipowner's obligation to the longshoremen is "very limited," because in many cases the defect is not obvious or the shipowner is not aware of it, and thus there can be no question that the "primary" obligation is the stevedore's. But within that class of cases in which the ship is unsafe at the outset, or the danger is known to the shipowner, or the shipowner has attempted to correct it, the shipowner's duty is not "very limited." To the contrary, it is so compelling and so overriding that the shipowner cannot escape liability even when the stevedore is positively improvident in assuming a known risk. We simply do not understand how in that context it can properly be said that the stevedore's responsibility is nonetheless "primary."

Where there is uncontradicted evidence of an unsafe ship at the outset, or a danger known to the shipowner, or an unsuccessful attempt by the shipowner to correct it, this notion of "primary" and "secondary" responsibility has no meaning. It certainly provides no guidance for a jury. The question instead is whether the shipowner was negligent, and that is exactly what the trial court instructed. And yet the Circuit Court reversed a jury's

verdict in this case on the sole basis that the trial court had failed to follow a boilerplate prescription yanked out of context from the *Scindia* opinion—and wholly inappropriate in light of the uncontradicted facts of this case. We strenuously urge the Court to accept review of this case, and to restore to their proper context the relative responsibilities prescribed by *Scindia*.

CONCLUSION

It is respectfully urged that a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

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APPENDIX

Darnell HUNTER, Plaintiff-Appellee,
Cross-Appellant,

v.

REARDON SMITH LINES, LTD., a foreign corporation, Defendant-Appellant,
Cross-Appellee.

No. 81-6143.

United States Court of Appeals,
Eleventh Circuit.

Nov. 14, 1983.

Longshoreman brought action against shipowner seeking damages for injuries sustained while working on the vessel. The United States District Court for the Middle District of Florida, George C. Carr, J., entered judgment on a jury verdict in favor of longshoreman, and cross appeals were taken. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) trial court, which properly charged jury that shipowner had no general duty to discover unknown dangers, committed reversible error in failing to instruct jury that stevedore retained primary responsibility even with respect to dangers which are known to the shipper, and (2) effect of future inflation is properly considered in calculating any award of future damages which longshoreman received for injuries sustained while working aboard vessel.

Reversed and remanded.

1. Federal Courts (Key) 911
Shipping (Key) 86(3)

In suit brought by longshoreman against shipowner to recover damages for injury sustained when he was struck

by a bag of phosphate which had fallen from a pallet which was being carried by a crane, trial court, which properly charged jury that shipowner had no general duty to discover unknown dangers, committed reversible error in failing to instruct jury that stevedore retained primary responsibility even with respect to dangers which are known to the shipper.

2. Damages (Key) 226

Effect of future inflation is properly considered in calculating any award of future damages which longshoreman received for injuries sustained while working aboard vessel.

Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

Darnell Hunter, a longshoreman, was injured while working aboard the motor vessel FRESNO CITY in Tampa, Florida. Hunter brought this action for negligence against the shipowner, Reardon Smith Lines. The District Court for the Middle District of Florida entered judgment on a jury verdict for $157,800 in Hunter's favor. Reardon Smith appeals, contending *inter alia* that the district court's instructions to the jury did not adequately set out the governing law as interpreted by the United States Supreme Court in *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). We agree, and thus we reverse and remand for a new trial. In addition, we grant Hunter's cross-appeal and order that the effect of future inflation should be considered in calculating any award for future damages Hunter receives on remand.

I. FACTUAL SUMMARY

On July 26, 1978, Hunter was employed as a longshoreman by the Tampa Stevedoring Co. ("the stevedore") and was assigned to a gang of approximately 14 men who were loading bags of phosphate into hold number three on the FRESNO CITY. The bags of phosphate weighed approximately 110 pounds each and previously had been loaded on pallets by the stevedore. Several members of Hunter's gang were on the dock attaching spreader bars to the pallets. One gang member was operating the ship's number three crane, and another member of the gang was on the deck giving signals to the crane operator. The remainder of the gang members, including Hunter, were in hold number three, unloading bags off the pallets and stowing them in the hold.

Longshoremen were working in all five of the FRESNO CITY's holds on July 26, and work began at approximately 8:00 a.m. Within a few minutes, however, the crane which was carrying pallets to the number three hold was taken out of service, apparently because it was leaking oil or hydraulic fluid.[1] The ship's engineers worked on the crane for almost two hours, and the crane was put back into operation sometime between 10:00 and 10:30 a.m. There was conflicting testimony regarding whether the crane was functioning properly after it began operating again.[2]

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1. One witness testified that the crane was "pouring oil," Record on Appeal ("ROA"), vol. 6, at 68. The ship's chief officer testified that the crane lost 20 gallons of hydraulic fluid in 10 minutes. Deposition of Chief Officer Robert E. Baker at 60.

2. Hunter's witnesses, all longshoremen who were down in the hold, testified that during this time the crane was "dragging," "smoking bad," "leaking oil," and making a "whining noise," and that the crane was just "barely coming over to the top, and then a lot of time it would stop in the middle of the air and

(Continued on following page)

Hunter's accident occurred less than an hour after the crane was put back into operation. Hunter and three other longshoremen were building a runway in the hatch area when two bags fell off a pallet above them. One of the bags landed on the deck, but the other bag fell into the hold and hit Hunter on the back.[3] One of the men working with Hunter testified that the bags fell because the crane stopped suddenly and jarred the bags off the pallet. Another man working in the hold testified that the crane "cut off" and dropped the pallet slightly, causing the pallet to hit the edge of the hatch opening and thus knocking the bags loose. Other witnesses testified that the crane did not stop suddenly and that the pallet did not hit anything, and some of the witnesses contended that the bags of phosphate simply were slippery and often fell off without explanation.

Although Hunter was knocked down and momentarily stunned by the blow from the bag, in a few minutes he was able to slowly climb a ladder out of the hold[4] and was taken to a hospital. The rest of the longshoremen in hold number three continued the loading operation, using the same crane which allegedly had caused Hunter's injury.

Footnote continued—

swing." ROA, vol. 6, at 29, 30, 48, 70. In contrast, Reardon Smith's witnesses, the ship's captain, the chief officer and several longshoremen, including the crane operator and the safety man, testified either that the crane was operating properly or simply that they could not remember any problems with the crane after it was put back into operation.

3. Some witnesses testified that Hunter was in the hatch opening, and Reardon Smith contended that this constituted contributory negligence. Other witnesses indicated that Hunter was in the wings rather than in the hatch opening and that the bag hit the corner of the hatch and ricocheted into the wings. The jury found that Hunter was not contributorily negligent.

4. The longshoremen on the deck had lowered a stretcher for him, but Hunter decided to climb a ladder to get out of the hold.

The ship's engineers did shut down the crane at 11:50 a.m., apparently to make some repairs or to perform some maintenance,[5] but the crane was back in operation at 1:00 p.m. when the longshoremen returned from lunch and was used without incident for the rest of that day[6] and the two days which followed.

Hunter spent two days in the hospital in traction. Subsequently, he was treated by several physicians for a variety of problems which he attributed to his injury. The jury awarded Hunter $7,800 for "past damages" (lost wages, medical bills, pain and suffering), $50,000 for future pain and suffering, and $100,000 for loss of future wages.

II. THE JURY INSTRUCTIONS

[1] Reardon Smith's primary contention[7] on appeal is that the district court did not adequately instruct the jury on the law which governs a shipowner's duty to longshoremen working on board a vessel. Both parties agree that the jury should have been instructed in accord with the rules established by the Supreme Court in *Scindia Steam Navigation Co. v. Santos, supra*, and we begin our analysis of this issue with a brief review of the *Scindia* decision.

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5. The ship's engineers did not testify at trial. Thus, it is not entirely clear why the crane was shut down just 10 minutes before the lunch break, nor is it clear what repairs, if any, were undertaken at this time.

6. Hunter points out that the crane was shut down at 3:30 p.m. on the day of the accident and argues that the early shutdown suggests that the crane was malfunctioning. The record indicates, however, that all of the ship's loading operations stopped at that time due to rain. Thus, the fact that the crane was shut down at 3:30 p.m. does not suggest that anything was wrong with the crane.

7. Reardon Smith raised a number of other contentions on appeal. The other major contention, that the jury's verdict was against the manifest weight of the evidence and excessive as a matter of law, is without merit. The remaining contentions relate to issues which may not arise again on remand; thus, we need not consider them.

The facts in *Scindia* were similar to the facts in this case. A longshoreman was injured when he was struck by a sack of wheat that had fallen from a pallet being held in suspension by one of the ship's winches, which was being operated by another longshoreman. The evidence established that the braking mechanism which slowed the winch's descent had been malfunctioning for several days, but it was not clear whether the sacks which hit the longshoreman had fallen because the braking mechanism slipped or because the suspended pallet was swinging back and forth.

The district court had granted summary judgment for the shipowner, reasoning that the shipowner was not liable for dangerous conditions created by the stevedore, the longshoreman's employer, while the stevedore was in exclusive control of the loading operation. The Court of Appeals for the Ninth Circuit had reversed, ruling that a shipowner had to exercise "reasonable care under the circumstances" and that there were factual questions about the shipowner's conduct which had to be resolved by a jury. The Supreme Court affirmed the Ninth Circuit's judgment, but set forth a somewhat different standard regarding the duty the shipowner has to longshoremen working on board a vessel.

The Supreme Court ruled that at the outset of cargo operations the shipowner's duty

> extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should

> be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

451 U.S. at 166-67, 101 S.Ct. at 1622. Once cargo operations have begun, however, the scope of the shipowner's duty usually is somewhat limited.[8] According to the Supreme Court:

> [A]bsent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself.

Id. at 172, 101 S.Ct. at 1624. Nevertheless, addressing the situation where a shipowner learns that an apparently dangerous condition has developed during the cargo operations, the Supreme Court held that "there are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations." *Id.* at 175, 101 S.Ct. at 1626. Thus, although

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8. Even though cargo operations have begun, the shipowner may be liable for injuries to longshoremen if the shipowner is "actively involve[d]" in the cargo operations or "fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." 451 U.S. at 167, 101 S.Ct. at 1622.

the court noted that the determination of whether problems with the ship's gear pose an unreasonable risk of harm to the longshoremen is "a matter of judgment committed to the stevedore in the first instance," *id.*, the court held that if the shipowner is aware that the ship's gear is malfunctioning, that the stevedore is nonetheless continuing to use it, and that the stevedore's continued use of the gear is "obviously improvident," then the shipowner has a duty to intervene and repair the ship's gear. *Id.* at 175-76, 101 S.Ct. at 1626-27.

In this case, Hunter argued at least two theories of liability to the jury.[9] First, Hunter argued that Reardon Smith's employees negligently turned over a malfunctioning crane to the stevedore, thus breaching the duty to have the ship and its equipment in proper condition so that the stevedore could carry on cargo operations with reasonable safety. Second, Hunter argued in the alternative that a dangerous condition arose during the course of the cargo operations, that Reardon Smith's employees were aware of the dangerous condition,[10] and that Reardon Smith's employees failed to intervene even though they knew or should have known that the stevedore's continued use of the crane to load bags of phosphate created an unreasonable risk of harm to the longshoremen, thus breaching the shipowner's duty to act when the stevedore's actions are obviously improvident.

Although the district court properly instructed the jury regarding the shipowner's duty to have the ship and

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9. Hunter suggests a third theory on appeal—that Reardon Smith is liable because its employees negligently failed to repair the crane after voluntarily undertaking a duty to make repairs. We need not consider this theory or decide whether it was adequately submitted to the jury. *See* note 15 *infra*.

10. Hunter made a strong effort during the trial to convince the jury that the FRESNO CITY's officers were aware that the crane was malfunctioning after it was put back into operation.

its gear in proper condition for the stevedore,[11] we conclude that the court did not adequately inform the jury about the limited nature of the shipowner's duty once the stevedore has commenced, and assumed primary responsibility for, the cargo operations. The only instructions the district court gave regarding the shipowner's duty after cargo operations have begun were as follows:

> [O]nce the stevedore's cargo operations have begun, absent positive law or custom to the contrary, the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to *discover* dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. Thus, the shipowner is not liable to the longshoremen for injuries caused by dangers *unknown* to the shipowner and about which he had no duty to inform himself.

Record on Appeal, vol. 11, at 484 (emphasis added). These instructions were in accord with *Scindia*, but they dealt only with Reardon Smith's duty, and the limits thereon, with respect to *unknown* dangers. The instructions did not give the jury any guidance about the scope of the shipowner's duty when there is a problem with the ship's gear that is *known* to both the shipowner and the stevedore. Such guidance was necessary for the jury to properly consider Hunter's second theory of liability. In other words, there are two potential duties on the part of the shipowner once cargo operations have begun: the potential duty to *discover unknown* dangers, and the potential duty with respect to dangers which are *known* to the shipowner. The trial court here, in the instruction quoted

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11. The court's instructions on Hunter's first theory of liability were taken almost verbatim from the Supreme Court's *Scindia* decision.

above, properly charged the jury that the shipowner has no general duty to *discover unknown* dangers. However, the quoted instruction does not address the shipowner's second potential duty, *i.e.*, with respect to dangers which are *known* to the shipowner. With respect to this potential duty the Supreme Court in *Scindia* precisely defined the *very limited* duty of the shipowner:

> Yet it is quite possible, it seems to us, that . . . [the stevedore's] judgment in this respect was so obviously improvident that . . . [the shipowner], if it *knew* of the defect and that . . . [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch.

451 U.S. at 175-76, 101 S.Ct. at 1626 (footnote omitted) (emphasis added). The Court also defined the primary responsibility of the stevedore:

> [W]hether it could be safely used or whether it posed an unreasonable risk of harm to . . . [the longshoremen] was a matter of judgment committed to the stevedore in the first instance.

Id. at 175, 101 S.Ct. at 1626. The Supreme Court went on to rule:

> [T]he legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty. The trial court and where appropriate, the jury, should thus be made aware of the scope of the stevedore's duty under the positive law.

Id. at 176, 101 S.Ct. at 1626.

Although the trial court here may have properly charged the jury as to the primary nature of the stevedore's responsibility during cargo operations with respect to the discovery of *unknown* dangers, it failed to instruct the jury that the stevedore retains the primary responsibility even with respect to dangers which are *known* to the shipowner. Reardon Smith requested, and was entitled to, such instructions. We thus conclude that the district court erred. The error is significant because the trial focussed on Reardon Smith's duty with respect to *known* dangers. The Supreme Court in *Scindia* expressly held that the jury should be made aware of the "duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed." *Id.* at 176, 101 S.Ct. at 1626.

The error was magnified by a paragraph early in the jury charge which suggested to the jury that the shipowner had a duty to supervise the cargo operations. The district court instructed the jury:

> In this case, the plaintiff claims that the defendant was negligent and that such negligence was a legal cause of damage sustained by the plaintiff. Specifically, the plaintiff alleges that the crane on the M/V FRESNO CITY was malfunctioning before the accident and that the defendant was negligent in failing to properly maintain and repair the ship's crane at hatch number three *or to properly supervise cargo operations.* In order to prevail on this claim, the plaintiff must prove by a preponderance of the evidence, one, that the defendant was negligent, and two, that such negligence was a legal cause of damage sustained by the plaintiff.

Record on Appeal, vol. 11, at 482-83 (emphasis added). We recognize that this instruction merely told the jury that

"the plaintiff alleges . . . that the defendant was negligent in failing . . . to properly supervise cargo operations." *Id.* (emphasis added). However, the last sentence might have given the jury the impression that the plaintiff could prevail on his claims—including the "failure to supervise" claim—merely by proving negligence and proximate cause. Such an impression would have been reinforced by comments Hunter's counsel made during closing argument[12] which also suggested that Reardon Smith had a duty to supervise the cargo operations.[13]

We conclude, therefore, that the district court did not adequately instruct the jury on the law relevant to Hunter's second theory of liability. Further, although the court properly instructed on Hunter's first theory of liability, the jury returned only a general verdict and we are unable to determine from the record which theory the jury relied

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12. For example, in response to Reardon Smith's argument that the crane was not malfunctioning and that the bags of phosphate fell off the pallet because the bags were covered with plastic and, therefore, were very slippery, Hunter's attorney argued that the ship's crew members had a duty to stop the cargo operations if they saw the stevedore loading slippery bags without taking proper safety precautions. *See, e.g.*, ROA, vol. II, at 433 ("[T]hen if you think that they were using an unsafe method of slippery bags and no safety slings, the mate—all the mates saw that and under the law did not do anything about it."); *id.* at 473 ("The chief mate did see bags—said he thought he saw some bags slip off on the dock and he didn't do anything about it like he was supposed to do."); *id.* at 473-74 ("But the guy I would like to hear is . . . the third or second mate, . . . to ask them a couple of questions: If you saw these dangerous slippery bags, why didn't you do something?").

13. Hunter suggests on appeal that a charge imposing a duty to supervise cargo operations on Reardon Smith is not error in any event because Reardon Smith did, by contract or course of dealing between the parties, undertake a duty of supervision. This argument cannot sustain the verdict because at the charge conference Hunter's counsel expressly agreed to delete any reference in the jury instructions to Reardon Smith's having undertaken *by contract* any duty to supervise. Record on appeal, vol. 10, at 367.

upon in reaching that verdict.[14] Accordingly, we reverse the judgment rendered below and remand for a new trial.[15]

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14. This case again illustrates the potential value of special verdicts. *See* Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968); *cf. Petes v. Hayes*, 664 F.2d 523 (5th Cir.1981).

15. Hunter argues that this court has discretion to affirm the jury's verdict because any error in the instructions on the second theory was harmless in view of the sufficiency of the evidence on the first theory of liability. We recognize that some courts have affirmed jury verdicts under similar circumstances. *See, e.g., Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir.1980) ("Where more than one theory of recovery has been submitted to the jury in a civil case, and where on appeal it is claimed that as to one of the theories there was a lack of evidential support or an error of law in submitting the theory to the jury, the reviewing court has discretion to construe a general verdict so attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error."); *cf. American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir.1969) (where trial court instructed jury that it could find for plaintiff if it found defendant negligent on any of 31 particulars, the fact that one particular was not supported by the record did not require reversal because it was "inconceivable that in the mass of testimony so clearly establishing negligence in thirty other particulars this issue could have influenced the verdict . . . ."). *But see, e.g., Mixon v. Atlantic Coast Line R.R.*, 370 F.2d 852, 860 (5th Cir.1966) (Brown, J., specially concurring) ("Under the enigma wrapped in a mystery of the general charge and general verdict, we are required to assume that the jury followed only the erroneous instruction . . . ."). *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 742 (5th Cir.1980) (Anderson, J.) (quoting Judge Brown's opinion in *Mixon;* however, the question whether an appellate court has discretion to affirm under such circumstances was not considered by the court). We acknowledge the force of Hunter's argument that an appellate court should have some discretion to treat as harmless or nonreversible an error in the instructions pertaining to one theory when there are accurate instructions with respect to other theories, but we need not address the argument or determine the scope of such discretion. Assuming *arguendo* we possess such discretion, we would not exercise it in this case. On the facts of this case, we conclude that there was a significant risk that the jury relied upon an erroneous assumption that Reardon Smith owed a duty to supervise cargo operations beyond the limited duty imposed by law. *Cf. Traver v. Meshriy*, 627 F.2d at 938-39 (outlining the factors which a court should consider in deciding whether to exercise its discretion to affirm despite an error with respect to one theory of liability).

III. HUNTER'S CROSS-APPEAL

[2] On cross-appeal, Hunter contends that the district court erred when it refused to permit expert testimony or to instruct the jury regarding the effect of future inflation on the award for future damages. In ruling on this matter, the district court relied on *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.), *cert. denied*, 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975), which proscribed consideration of inflation in making awards for future damages. Developments since the trial of this case indicate that *Penrod* is no longer viable law. *See Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir.1982) (en banc);[16] *see also Jones & Laughlin Steel Corp. v. Pfeifer*, ... U.S. ....., 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). Accordingly, if a new trial is necessary, the effect of future inflation on any award Hunter receives for future damages should be accounted for in an appropriate manner.

REVERSED and REMANDED.

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16. The mandate has not yet issued in *Culver v. Slater Boat Co.*, which expressly overrules *Penrod*, but *Culver* undoubtedly will govern if retrial is necessary.

(Filed October 9, 1981)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 80-597-Civ-T-GC

DARNELL HUNTER,
Plaintiff,

vs.

REARDON SMITH LINES, LTD.,
a foreign corporation,
Defendant.

ORDER

This case is before the Court upon a variety of post-trial motions. The Court has considered the motions, the memoranda attached thereto and after careful consideration, the Court rules as follows:

1. Plaintiff's Motion for a New Trial is DENIED.

2. Defendant's Motion for a New Trial is DENIED.

DONE AND ORDERED in Chambers in Tampa, Florida, this 9th day of October, 1981.

/s/ George C. Carr
United States District Judge

(Filed September 21, 1981)

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
FLORIDA - TAMPA DIVISION

Civil Action File No. 80-597-Civ-T-GC

DARNELL HUNTER,
Plaintiff,

vs.

REARDON SMITH LINES, LTD.,
a foreign corporation,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable GEORGE C. CARR, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that plaintiff, DARNELL HUNTER, is hereby awarded damages against the defendant REARDON SMITH LINES, LTD., in the sum of ONE HUNDRED FIFTY SEVEN THOUSAND EIGHT HUNDRED DOLLARS ($157,800.00), with interest thereon as provided by law, together with his costs of this action.

Dated at Tampa, Florida , this 18th day of September, 1981.

Wesley Theis
Clerk of Court
by: /s/ Blanca M. Ropes
Deputy Clerk

UNITED STATES COURT OF APPEALS

Eleventh Circuit

Office of the Clerk
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Spencer D. Mercer
Clerk

In Replying, give Number
of Case and Names of Parties

January 6, 1984

Clerk
U. S. District Court
PO Box 3270
Tampa, FL 33601-3270

No. 81-6143 HUNTER vs. REARDON SMITH LINES, LTD.
DC NO. 80-597-Carr

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 25 Decision in the above case issued as an [sic] for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate. *See attached notice.*

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.

(X) Original record on appeal or review. 11 volumes record

(X) Original exhibits. 2 envelopes exhibits

(X) Bill of Costs approved by this Court.

Sincerely,

Spencer D. Mercer, Clerk
By: /s/ Linda Prett
Deputy Clerk

Encl.

cc: w/encls: Mr. Brendan P. O'Sullivan
Mr. Joel S. Perwin

UNITED STATES COURT OF APPEALS

Eleventh Circuit

Office of the Clerk

Norman E. Zoller
Clerk

Tel. 404-221-6187
Fts-242-6187
56 Forsyth St. N.W.
Atlanta, Georgia 30303

December 22, 1983

TO ALL PARTIES LISTED BELOW:

No. 81-6143 HUNTER vs. REARDON SMITH LINES, LTD.

The enclosed order has this day been entered on petition( ) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure and Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

Norman E. Zoller, Clerk
By: /s/ Linda Prett
Deputy Clerk

Enclosures

cc: Mr. Brendan P. O'Sullivan
Mr. Joel S. Perwin

(Filed December 22, 1983)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6143

DARNELL HUNTER,
Plaintiff-Appellee,
Cross-Appellant,

versus

REARDON SMITH LINES, LTD., a foreign corporation,
Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION FOR REHEARING

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

Entered for the Court:

/s/ R. Lanier Anderson III
United States Circuit Judge